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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SHIRLEY PEARSON, Plaintiff and Appellant, v. STATE FARM GENERAL INSURANCE COMPANY, Defendant and Respondent.	D074426 (Super. Ct. No. 37-2016-00021795-CU-IC-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Earl H. Maas, III, Judge. Affirmed.

J. Lorenzo Law, Jayson M. Lorenzo and Ryan J. Altomare for Plaintiff and Appellant.

Hugues & Nunn, Randall M. Nunn and Melissa K. Mixer for Defendant and Respondent.

This is a homeowners insurance policy coverage dispute. The insurer, State Farm General Insurance Company (State Farm), denied a claim submitted by the insured, Shirley Pearson, based on the theft of her personal property from the insured location by

one of her tenants at the location. Pearson sued State Farm for breach of contract and breach of the implied covenant of good faith and faith dealing. Following cross-motions for summary adjudication, the trial court ruled that the applicable policy provisions excluded coverage as a matter of law. More specifically, the court concluded that Pearson was not entitled to policy benefits because of an exclusion for any loss caused by a theft that was committed by a person—here, the tenant—who "regularly resided on the **insured location**."[1]

We agree with the trial court's interpretation of the applicable Policy provisions and will affirm the judgment. The Policy provisions at issue are not ambiguous; they exclude coverage for the tenant's theft of Pearson's personal property under the undisputed facts presented.

I. PROCEDURAL BACKGROUND

Pearson filed the underlying action against State Farm, and the operative complaint is a first amended complaint filed in August 2016. Asserting causes of action for breach of contract and breach of the covenant of good faith and fair dealing, Pearson alleges that State Farm wrongly denied her claim for insurance benefits under the Policy, a homeowners insurance policy for a dwelling located at 1788 Alta Vista Drive in Vista, California (Alta Vista Property).

The underlying facts that caused the loss that led to Pearson's claim and resulted in State Farm's denial of benefits, which we describe at part II., *post*, are not in dispute.

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1 Throughout this opinion, words in bold lower case font within quoted language are specifically defined terms in Pearson's State Farm policy No. 77-C3-9549-2 (Policy).

Accordingly, pursuant to Code of Civil Procedure section 437c, subdivision (t), the parties presented cross-motions for summary adjudication of issues requiring the interpretation of certain Policy provisions.[2] (See *AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014, 1017 & fn. 2.) The court granted State Farm's motion and denied Pearson's motion, ruling in relevant part that the applicable Policy language was not ambiguous and that the Policy exclusion found at part 9.b.(1) precluded coverage for Pearson's claim. In reaching its decision, the court also granted State Farm's request for judicial notice and sustained State Farm's objections to the evidence submitted by Pearson.

The parties then stipulated that the ruling on the cross-motions for summary adjudication "effectively determined, as a matter of law, critical issues in this case . . . such that [Pearson] would not be able to obtain any favorable result at trial as to either one of the causes of action set forth in [her] First Amended Complaint[.]" The stipulation further provided that judgment be entered in favor of State Farm and against Pearson "to hasten" appellate review.

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2 Code of Civil Procedure section 437c, subdivision (t) allows parties to stipulate that the court should hear a motion for summary adjudication of issues on the basis that the resolution of the motion will further the interest of judicial economy by decreasing trial time or significantly increasing the likelihood of settlement. A party may bring such a motion even though, contrary to subdivision (f), the requested ruling on the motion will not completely dispose of a cause of action, affirmative defense, or issue of duty. (Code Civ. Proc., § 437c, subd. (t).) A motion filed pursuant to subdivision (t) "proceed[s] in all procedural respects as a motion for summary judgment." (Code Civ. Proc., § 437c, subd. (t)(5).)

The trial court entered judgment in favor of State Farm and against Pearson, and Pearson timely appealed in July 2018. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 401 [judgment following stipulation is appealable where the intent of the parties is "to hasten its transfer from the trial court to the appellate court"].)

II. FACTUAL BACKGROUND

Pearson owns the Alta Vista Property, State Farm issued the Policy for the Alta Vista Property, and the Policy was in effect at the time of the theft and the claim.

Pearson, who lived on the Alta Vista Property, rented a portion of her residence to tenants. From mid-December 2013 through approximately mid-September 2014, Pearson rented a room in her residence on the Alta Vista Property to Dean Edwards.[3] Edwards's room was located within Pearson's residence, down a hallway on the other side of a locked door that separated Pearson's living space from three separate rooms (including Edwards's) and a shared bathroom that Pearson rented to tenants. Edwards had his own locked entrance from the driveway outside directly into his room; his key would not allow him entry into Pearson's living area within the residence; and other than his assigned parking space, the pathway from the parking space to the outside entrance to his room, the inside hallway to the shared bathroom, and the shared bathroom, he was not allowed elsewhere on the Alta Vista Property.

During some or all of the time that Edwards resided in the residence on the Alta Vista Property, the following people also resided on the Alta Vista Property with

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3 Edwards's tenancy was terminated following unlawful detainer proceedings that Pearson initiated against Edwards.

Pearson's knowledge and authorization: two women who lived in an attached structure; another woman who lived in a separate "granny flat structure"; Pearson's adult son and his girlfriend, who lived in a mobile home on the east side of the Alta Vista Property.

By the time Edwards moved out in mid-September 2014, Pearson suspected that he had been stealing personal property from her (in particular, from a toolshed and a bicycle shed); and, as Edwards packed his car, Pearson saw him making multiple trips to his car with large filled garbage bags. Pearson's son, who had been living elsewhere during the end of Edwards's tenancy, returned to reside on the Alta Vista Property a few days after Edwards moved out. Pearson's son noticed immediately that Edwards's previously furnished room no longer had furniture, and as he further investigated he determined that a locked shed had been broken into and ransacked and that personal property was missing from the garage.

Pearson reported the loss of property to the police, and Edwards was arrested and charged with felony theft.[4] After the police report, in October 2014 Pearson filed a claim with State Farm. Based on the theft of her personal property from the Alta Vista Property, Pearson sought Policy benefits for the value of her stolen property.[5]

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4 In April 2015, Edwards pleaded guilty to misdemeanor theft from an elder. (Pen. Code, § 368, subd. (d).)

5 According to the San Diego County Sheriff's Department Crime/Incident Report, Pearson told the investigating officer that "Edwards stole 8 crates of tools, a solar panel kit, and a pressure washer," which together had an estimated value of $44,717.80.

After investigation, State Farm denied Pearson's claim—orally at the end of June 2015 and in writing less than a week later. In the July 2015 letter, State Farm first explained that Pearson's son advised "that [Pearson's] tenant was responsible for the theft of the personal property claimed" and then detailed that Pearson had not experienced a covered loss because the Policy does not cover theft by anyone "regularly residing on the insured location." In addition, State Farm quoted from part 9.b.(1) of the Policy, which provides in part that coverage for losses caused by theft does not include theft "committed by an **insured** or by *any other person regularly residing on the* ***insured location***." (Italics added.)

III. DISCUSSION

Pearson contends that State Farm was not entitled to summary adjudication of the coverage issue. According to Pearson, she is entitled to Policy benefits for the loss caused by the theft, because the Policy exclusion on which State Farm relied either does not apply or is ambiguous and must be construed under the rules resolving ambiguities in contracts.

As we explain in our de novo review, Pearson did not meet her burden of establishing reversible error. After first considering the applicable Policy provisions, we will then discuss the specific arguments Pearson raises on appeal.

A. *Standards of Review*

Because the trial court's judgment is presumed correct, Pearson (as the appellant) has the burden of establishing reversible error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).) We review de novo a trial court order granting or denying

summary adjudication. (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 273.) As a practical matter, " ' " 'we assume the role of a trial court and apply the same rules and standards' " ' " which govern the trial court's determination of the motion in the first instance. (*People ex rel. Becerra v. Huber* (2019) 32 Cal.App.5th 524, 532 [cross motions for summary adjudication].)

Where, as here, the underlying facts are not in dispute, "the interpretation of a contract, including whether an insurance policy is ambiguous or whether an exclusion or limitation is sufficiently conspicuous, plain, and clear, is a question of law." (*Hervey v. Mercury Casualty Co.* (2010) 185 Cal.App.4th 954, 962-963 (*Hervey*).) Thus, we independently review a trial court's interpretation of the terms of an insurance contract. (*E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470 (*E.M.M.I.*).)

B *Interpretation of Insurance Policies*

The interpretation of an insurance policy is conducted "under well-settled rules of contract interpretation." (*E.M.M.I., supra*, 32 Cal.4th at p. 470.)

These well-settled rules are based on the premise that " 'the interpretation of a contract must give effect to the "mutual intention" of the parties. "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' . . . controls judicial interpretation. (*Id.*, § 1638.)" ' " (*E.M.M.I., supra*, 32 Cal.4th at p. 470.)

"[P]olicy exclusions are strictly construed [citations], while exceptions to exclusions are broadly construed in favor of the insured." (*Id.* at p. 471.)

A provision in an insurance policy is ambiguous "when it is susceptible to two or more reasonable constructions." (*E.M.M.I., supra,* 32 Cal.4th at p. 470.) "Language in an insurance policy is 'interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract.' " (*Ibid.*) " 'The proper question is whether the [provision or] word is ambiguous in the context of *this* policy and the circumstances of *this* case.' " (*Ibid.*) Because an ambiguity in an insurance contract must be resolved in a manner consistent with the objectively reasonable expectations of the insured, ambiguous language is " 'generally construed against the party who caused the uncertainty to exist (i.e., the insurer).' " (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868 (*Foster-Gardner*).)

C. *The Policy Provisions at Issue*

State Farm denied Pearson's theft claim on the basis that it was not a covered loss under the terms of the Policy. More specifically, State Farm denied the claim on the basis that Edwards, a tenant who lived in one of the structures on the Alta Vista Property, was responsible for the theft of Pearson's personal property and the Policy does not cover anyone "regularly residing on the insured location."

In resolving the issues on appeal, we must construe portions of the following Policy provisions:

"**SECTION I — LOSSES INSURED**

"**COVERAGE A — DWELLING** [¶] . . . [¶]

"**COVERAGE B — PERSONAL PROPERTY**

"We insure for accidental direct physical loss to property described in Coverage B caused by the following perils . . . : [¶] . . . [¶]

"9. **Theft,** including attempted theft and loss of property from a known location when it is probable that the property has been stolen.

"This peril does not include: [¶] . . . [¶]

"b. loss caused by theft:

"(1) committed by an **insured** or by any other person regularly residing on the **insured location**. . . . [¶] . . . [¶]

"(3) from the part of a **residence premises** rented to others:

"(a) caused by a tenant . . . ."

Without the Policy's printed formatting, the relevant loss and exclusions provide as follows: Although State Farm insures for accidental loss to personal property caused by "[**t**]**heft**," the loss is excluded if it is caused either by theft "committed by . . . any . . . person regularly residing on the **insured location**" (pt. 9.b.(1)) or by theft "from the part of a **residence premises** rented to others . . . caused by a tenant" (pt. 9.b.(3)(a)).

In analyzing these provisions, we must apply the following definitions contained in the Policy:

"**DEFINITIONS**

" 'You' and 'your' mean the 'named insured' shown in the **Declarations**. . . . 'We', 'us' and 'our' mean the Company shown in the **Declarations**. [¶] Certain words and phrases are defined as follows: [¶] . . . [¶]

"5. '**insured location**' means:

"a. the **residence premises**; [and]

"b. the part of any other premises, other structures and grounds used by you as a residence. . . . ; [and]

"c. any premises used by you in connection with the premises included in 5.a. or 5.b. . . . [¶] . . . [¶]

"10. '**residence premises**' means:

"a. the one, two, three or four-family dwelling, other structures and grounds; or

"b. that part of any other building;

"where you reside and which is shown in the **Declarations**."

For purposes of these definitions, the parties have not provided us with a copy of the Policy "**Declarations**." However, the definition of " '**Declarations**' " includes "the most recent renewal notice or certificate," and the record contains a copy of the renewal certificate for the policy period in question. From the renewal certificate, we understand that the "named insured" is Pearson, and the "**residence premises**" is the Alta Vista Property.

D. *Pearson Did Not Meet Her Burden of Establishing That the Trial Court Erred in Interpreting and Applying the Relevant Policy Provisions to the Undisputed Facts*

We begin, as required by rules of contract interpretation, by considering the written provisions of the Policy, applying words and phrases in their ordinary and popular sense. (Civ. Code, §§ 1638, 1639; *E.M.M.I., supra,* 32 Cal.4th at p. 470.)

For purposes of Section I ("Losses Insured"), subsection B. ("Personal Property") of the Policy, the parties agree that a "**Theft**" occurred; more specifically, they agree that Edwards stole personal property and that Pearson filed an insurance claim for the loss. Part 9.b.(1) expressly *excludes* any loss caused by theft "committed by . . . any . . . person

regularly residing on the **insured location**."[6] The Policy defines "**insured location**" to include, among other things, "the **residence premises**" *and* "the part of any other premises, other structures and grounds used by you as a residence" *and* "any premises used by you in connection with the premises included in [*either* the residence premises *or* the part of any other premises, other structures and grounds used by you as a residence]." The Policy defines "**residence premises**" as *either* "the one, two, three or four-family dwelling, other structures and grounds . . . where you reside and which is shown in the **Declarations**" *or* "that part of any other building . . . where you reside and which is shown in the **Declarations**."

Encouraging us to determine the parties' intent from the plain meaning of the Policy provisions, State Farm relies on the exclusion found at part 9.b.(1) to preclude coverage for Pearson's claim. According to State Farm, at the time of the theft of the personal property (from the room that Edwards had been renting, a locked shed, a garage, and the bed of a pickup truck—all located on the Alta Vista Property), Edwards regularly resided "on the **insured location**." State Farm bases its position on the Policy definition of "**insured location**," which includes not only the dwelling, other structures and grounds where Pearson resided ("**residence premises**"), but also "any premises" used by Pearson "in connection with" the dwelling, other structures and grounds where Pearson resided. In this regard, the parties agree that "[Pearson] rented a room in her house at 1788 Alta

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6 As will become relevant when we consider Pearson's arguments, at part 9.b.(3)(a) the Policy also *excludes* any loss caused by theft "from the part of a **residence premises** rented to others . . . caused by a tenant[.]"

Vista Drive, Vista[,] California to Dean Edwards beginning in December 2013" and that "Mr. Edwards did not move out of [Pearson's] property at 1788 Alta Vista Drive, Vista[,] California until September 20, 2014."

On appeal Pearson presents four arguments in support of her position that State Farm's interpretation of the relevant Policy provisions is wrong and, accordingly, that she is entitled to Policy benefits for the loss of her personal property taken by Edwards. The first argument, one of straight contract interpretation, is that the Policy exclusion found at part 9.b.(3)(a) supersedes the Policy exclusion found at part 9.b.(1), and part 9.b.(3)(a) does not exclude the loss for most of the personal property that Edwards took. The next three arguments are based on what Pearson contends are ambiguities in the Policy. We are not persuaded by any of Pearson's arguments.

1. *The Exclusion at Part 9.b.(3)(a) Does Not Supersede the Exclusion at Part 9.b.(1)*

Part 9.b.(1) excludes any loss caused by theft "committed by . . . any . . . person regularly residing on the **insured location**." Part 9.b.(3)(a) excludes any loss caused by theft "from the part of a **residence premises** rented to others . . . caused by a tenant[.]" The parties agree that, for purposes of this exclusion, Edwards was Pearson's tenant at the time of the theft. [7]

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7 "Tenant" is not a defined term in the Policy. The plain meaning of "tenant" is "one who holds or possesses real estate . . . by any kind of right (as in fee simple, in common, in severalty, for life, for years, or at will)." (Webster's 3d New Internat. Dict. (2002) p. 2354, col. 2.)

Pearson argues on appeal that, because a "tenant" is more specific than a "person regularly residing" at the property, the rules of statutory construction require that part 9.b.(3)(a) supersede part 9.b.(1). If, as Pearson contends, part 9.b.(3)(a) is applied and part 9.b.(1) is not, then all that could be excluded from coverage would be that the loss caused by Edwards's theft "from the part of [the] **residence premises** rented to others" (pt. 9.b.(3)(a)). In other words, according to Pearson's argument and contrary to State Farm's coverage determination, any loss caused by Edwards's theft "on the **insured location**" (pt. 9.b.(1)) would not be excluded unless the loss was from a "part of [the] **residence premises** rented to others" (pt. 9.b.(3)(a)).

Pearson relies on the general rule that, in construing insurance contracts, " ' "a specific provision relating to a particular subject will govern in respect to that subject, as against a general provision even though the latter, standing alone, would be broad enough to include the subject to which the more specific provision relates." ' " (*Jane D. v. Ordinary Mutual* (1995) 32 Cal.App.4th 643, 651 (*Jane D.*); see Civ. Code, § 3534 ["Particular expressions qualify those which are general."].) Applying this rule here, Pearson contends that the " ' "particular subject" ' " is the recovery of Policy benefits for a loss due to theft; the " ' "specific provision" ' " is part 9.b.(3)(a); and the " ' "general provision" ' " is part 9.b.(1). More specifically, Pearson argues that, because "*a tenant*" (pt. 9.b.(3)(a), italics added) is more specific than "*any . . . person regularly residing*" (pt. 9.b.(1), italics added), the exclusion at part 9.b.(3)(a) supersedes the exclusion at part 9.b.(1). We disagree.

For purposes of the rule in *Jane D., supra*, 32 Cal.App.4th at p. 651 and the maxim in Civil Code section 3534, part 9.b.(3)(a) is not a *particular* expression that qualifies a *general* expression at part 9.b.(1). Not all tenants regularly reside on the property leased by an insured,[8] and not all persons who regularly reside on an insured property are tenants.[9] Very simply, neither of these exclusions qualifies the other. Although they both apply to a loss caused by theft, one or the other or both may apply depending on whether the thief was a tenant (pt. 9.b.(3)(a)), a regular resident (pt. 9.b.(1)), or both. The fact that, in this case, Edwards was *both* a tenant (pt. 9.b.(3)(a)) *and* a person regularly residing (pt. 9.b.(1)) on the Alta Vista Property does not mean, as argued by Pearson, that, as a matter of contract interpretation, part 9.b.(3)(a) "supercedes" (*sic*) or "trumps" part 9.b.(1).

2. *The Extrinsic Evidence Offered by Pearson, by Itself, Does Not Establish an Ambiguity*

a. *Additional Background*

In support of her position that the applicable Policy language is ambiguous, Pearson submitted evidence from a deposition of a State Farm employee and from what Pearson's counsel describes as "excerpts of the Claims Notes" made by State Farm employees as they investigated Pearson's claim. In response, State Farm filed evidentiary

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8 For example, a nonresident parent could lease property and allow a child to reside on the leased property, or a corporation could lease property and allow a subsidiary corporation to have exclusive use of the leased property.

9 For example, as in this case, the insured property could have persons other than the named insured who resided on the property at the time of the theft, but who were not tenants.

objections, which the trial court sustained. According to Pearson, the evidence contained in the deposition testimony and in entries in State Farm's claims file on May 26, 27, and 29, 2015—at times referred to as the extrinsic evidence—is admissible, because it establishes an ambiguity in the Policy language on which State Farm relied in denying coverage, namely part 9.b.(1).

To the deposition testimony and to all three claims notes, State Farm objected on the following grounds:

> "Irrelevant. (Evidence Code §§ 210 and 350.) [¶] This material is irrelevant for purposes of [Pearson's] motion because the opinion of State Farm claims associates is inadmissible to interpret an insurance contract. (See *Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 865 ['opinion evidence is completely inadmissible [*sic*.] to interpret an insurance contract']; and *Advanced Network Inc. v. Peerless Ins. Co.* (2010) 190 Cal.App.4th 1054, 1066 [']it is the general and quite well settled rule of law that the principles of estoppel and implied waiver do not operate to extend the coverage of an insurance policy after the liability has been incurred or the loss sustained.'].)"

As to the claims notes dated May 26 and 27, 2015, State Farm also objected as follows:

> "The material is further irrelevant because the handling of [Pearson's] insurance claim is not relevant to [Pearson's] motion for summary adjudication."

Prior to the hearing on the parties' cross-motions, the trial court provided the parties with a tentative ruling to sustain State Farm's evidentiary objections. At the hearing, Pearson's counsel argued that, before deciding whether the relevant Policy language was ambiguous, the court was required to provisionally receive the extrinsic evidence; and if, based on this evidence, the language supported the meaning proffered by Pearson, then the court was required to admit the evidence and proceed with

interpreting the Policy language under well-settled rules dealing with ambiguities in insurance policies. Without further discussion, the court confirmed its tentative ruling which, in pertinent part, sustained State Farm's evidentiary objections to the extrinsic evidence.

b. *Additional Law*

"The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a *meaning* to which the language of the instrument is *reasonably susceptible*." (*Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (*Pacific Gas & Electric*) (1968) 69 Cal.2d 33, 37, italics added [indemnity clause in commercial contract].) This rule applies to the interpretation of insurance policies. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 436; *George v. Automobile Club of Southern Cal.* (2011) 201 Cal.App.4th 1112, 1120 (*George*) [applying rule, but finding no ambiguity].)

Therefore, "[i]n determining whether an ambiguity exists, a court should consider not only the face of the [insurance] contract but also any extrinsic evidence that supports a reasonable interpretation." (*American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1246; accord, *George*, *supra*, 201 Cal.App.4th at p. 1120.) That is because even language that appears plain and clear in the abstract may be found ambiguous in light of extrinsic evidence. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391 [easement].)

Where, as here, extrinsic evidence is offered to explain a disputed meaning of contractual language, the court is required to engage in a two-step process before interpreting the disputed language. First, the court must provisionally receive, without actually admitting, any credible extrinsic evidence that is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. (*Pacific Gas & Electric*, *supra*, 69 Cal.2d at p. 37; *Hervey*, *supra*, 185 Cal.App.4th at pp. 961-962.) Second, if, in light of the extrinsic evidence, the language is reasonably susceptible to the interpretation urged, then the extrinsic evidence is relevant and admitted into evidence to aid the court in interpreting the contract. (*Pacific Gas & Electric*, at pp. 39-40; *Hervey*, at p. 962.) Under no circumstances, however, may a court admit extrinsic evidence that "contradicts a clear and explicit policy provision." (*Hervey*, at p. 961.)

c. *Analysis*

On two independent bases, Pearson contends that the trial court erred in ruling that the extrinsic evidence did not support a finding of ambiguity. First, she argues that the court erred by not provisionally receiving the challenged evidence. Second, she argues that, because the challenged evidence establishes an ambiguity, the court erred by not admitting the evidence. As we explain, however, Pearson has not established that the court failed to provisionally receive the challenged evidence; and, in our de novo review, we conclude that the challenged evidence does not establish an ambiguity in the applicable Policy provisions.

We agree with Pearson not only that trial courts *must* provisionally receive credible extrinsic evidence that a party properly proffers in support of a claim of a

potential ambiguity (*Pacific Gas & Electric*, *supra*, 69 Cal.2d at p. 37; *Hervey*, *supra*, 185 Cal.App.4th at pp. 961-962), but also that "trial courts err if they refuse to consider the alleged [extrinsic] evidence on the ground that no [extrinsic] evidence of any sort is pertinent because the particular contract in dispute is unambiguous" (*George*, *supra*, 201 Cal.App.4th at p. 1122). Here, however, the record does not support Pearson's claim that the court failed to consider the extrinsic evidence, and we will not assume so solely because the court did not explain the procedure it employed. To the contrary, under established rules of appellate procedure based on the constitutional doctrine of reversible error, where (as here) the record is silent, we must " '*presum*[*e*]' " the trial court's order is correct, and " 'error must be affirmatively shown' " by Pearson. (*Denham*, *supra*, 2 Cal.3d at p. 564.) Here, there is no indication that the trial court did not consider the proffered evidence, conclude that it did not establish an ambiguity, and then rule that it was inadmissible.[10] Moreover, since the court sustained State Farm's evidentiary objections *after* Pearson's counsel expressly reminded the court of its obligation to

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10 At oral argument, Pearson's counsel stated that his recollection of the hearing in superior court included a statement from the judge to the effect that he had not considered—i.e., he had not provisionally received—the evidence Pearson offered to establish an ambiguity. We have reviewed the reporter's transcript of the proceedings and confirmed that the judge said nothing about either side's substantive arguments. Based on the tentative ruling, State Farm's counsel submitted the matter without comment; Pearson's counsel presented everything he wanted to say; and the court stated in full, as follows: "Thank you very much very much. I'm going to stick with my tentative. That was excellent argument."

provisionally receive the evidence prior to deciding whether to admit the evidence, we will not infer that the court failed to follow the proper procedure.[11]

Pearson next argues that, had the court provisionally received the extrinsic evidence, the court would have appreciated the ambiguity and, thus, the court erred in not *admitting* the extrinsic evidence. The determination of whether a contract is reasonably susceptible of the interpretation alleged by the party relying on the extrinsic evidence is a matter of law. (*George*, *supra*, 201 Cal.App.4th at p. 1122.) Thus, we determine de novo the issue of admissibility of the evidence. (*BRE DDR BR Whittwood CA LLC v. Farmers & Merchants Bank of Long Beach* (2017) 14 Cal.App.5th 992, 999 ["We review . . . the extrinsic evidence de novo"].) As we previewed at footnote 11, *ante*, we will reach the ultimate issue regardless of the procedure employed by the trial court.

Initially, we disagree with State Farm's suggestion that we review for an abuse of discretion the trial court's ruling on the admissibility of the extrinsic evidence proffered to establish an ambiguity in the Policy. The trial court has no discretion; if the proffered evidence tends "to prove a meaning to which the language of the instrument is reasonably

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11 In any event, even the erroneous exclusion of evidence does not require a reversal without a showing of prejudice (Code Civ. Proc., § 475) that resulted in a "miscarriage of justice" (Cal. Const., art. VI, § 13; Evid. Code, § 354, subd. (a)). (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) For purposes of this analysis, a "miscarriage of justice" may be found on appeal " ' "only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." ' " (*Ibid*.; accord, Code Civ. Proc., § 475.) As part of our de novo review of whether the Policy language is ambiguous (see text, *post*), we will conclude that the proffered evidence is not admissible; thus, Pearson did not suffer prejudice even if the trial court did not provisionally receive the evidence.

susceptible," then as a matter of law it is relevant and admissible. (*Pacific Gas & Electric, supra,* 69 Cal.2d at p. 37.)

As we explain in the next few paragraphs, the extrinsic evidence is inadmissible because it does not prove a meaning to which the language of the Policy is reasonably susceptible. We will discuss the deposition testimony and each of the three dates' claims notes separately.[12]

State Farm employee's deposition testimony. At her deposition, a State Farm employee agreed with Pearson's counsel's assumption that "the insured location in this particular instance would be the residence premises."[13] From this testimony, Pearson

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12 The claims notes contain a number of abbreviations entered by State Farm employees who apparently use and are familiar with commonly used abbreviations in their notes. Pearson, the party relying on the notes, has not attempted to explain—or suggest her understanding of—the meanings of these abbreviations. We have assumed, for purposes of this opinion, that the following abbreviations in the claims notes have the following meanings: NI, named insured; IA, insurance associate; PH, policyholder; LVM, left voicemail message; and PP, personal property.

13 The entirety of the cited deposition transcript reads as follows:

"Q. [Pearson's counsel] So I substituted insured location for residence premises, because it looks like insured location is defined somewhere else by — and I can show that to you if you want.

"A. [State Farm employee] Well, I know there is insured location.

"Q. There's a bunch of things that could be an insured location.

"A. Correct.

"Q. And I'm just assuming, you correct me if I'm wrong, the insured location in this particular instance would be the residence premises, right?

"A. Yes.

"Q. So I have substituted out, just so we can get this clear: [¶] This peril does not include loss caused by the named insured or any other person regularly residing on the residence premises. [¶] Right? Because insured location was in bold and you agree that the residence premises is how it should be defined?

argues on appeal that, by substituting the new definition into part 9.b.(1), this exclusion (which State Farm applied to deny coverage) is ambiguous. According to Pearson, after substituting the definition for "**residence premises**" in place of "**insured location**" in part 9.b.(1), "the relevant [P]olicy language reads that the exclusion applies to those 'regularly residing . . . where you reside.' " Regardless whether that clause is ambiguous, we reject Pearson's argument.

The language we are to consider and interpret is the Policy exclusion found at part 9.b.(1), not a new exclusion made up by Pearson with a defined term not contained in part 9.b.(1). A corporate employee's "agreement" with opposing counsel's suggestion that a defined term in an exclusion may be replaced by a different defined term that is not contained in the exclusion cannot create an ambiguity in the Policy language. (See *Foster-Gardner, supra,* 18 Cal.4th at p. 880 [where insurance policy "consistently treat[s separate terms] separately," we infer that this "careful separation" was "deliberate[] and intentional[]"].) In addition, Pearson's reliance on the employee's testimony cannot establish coverage, since " ' " ' "the doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy . . . risks expressly excluded therefrom[.]" ' " ' " (*Komorsky v. Farmers Ins. Exchange* (2019) 33 Cal.App.5th 960, 972.) Finally, we note that Pearson is not arguing that either of the defined terms "**insured location**" or "**residence premises**" is ambiguous, but only that, if the Policy definition of "**insured location**" in

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"A. For this claim.
"Q. For this claim. Okay. Good."

part 9.b.(1) *is replaced* by the Policy definition of "**residence premises**" (which is not mentioned in part 9.b.(1)), then the exclusion in part 9.b.(1) is ambiguous.

May 26, 2015 claim notes: "If the shed was not accessible to the tenant as part of his rental agreement, we would have coverage for the loss to NI's personal property. [¶] . . . Items stolen from a common area accessible to the tenant would not be covered." Neither of these statements refers to any specific Policy provision; and, to the extent Pearson considers this opinion testimony to be evidence of potential coverage, it is inadmissible. (*Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 865 (*Chatton*) ["opinion evidence is completely irrelevant to interpret an insurance contract"].) Thus, because neither statement in the May 26 entry proves a meaning to which *the language of the Policy* is reasonably susceptible, neither creates an ambiguity in Policy language.

May 27, 2015 claim notes: "Advise NO Coverage for Solar Panels if stolen from back of truck — Theft [part 9.b.(1)] & [part 9.b.(3)(a)]." Like the May 26 entries, this entry also fails to refer to any specific Policy language that may contain an ambiguity; and, to the extent Pearson contends this is an opinion of potential coverage based on the insurer's employee's interpretation of the Policy, it is irrelevant and, thus, inadmissible (*Chatton, supra,* 10 Cal.App.4th at p. 865). Like the May 26 entries, this entry does not create an ambiguity.

May 29, 2015 claim notes: "IA review claim and policy. Section 1 - Theft [part 9.b.](3)(a) does not include theft by tenant in common areas of residence premises. IA called PH back at 760 716-[xxxx] and LVM that all PP on the truck would not be

covered (Solar Panels, etc.) but PP locked in the shed would be extended coverage." The first sentence, which is consistent with Pearson's coverage position, is an accurate summary of the Policy language at part 9.b.(3)(a); i.e., the loss is excluded if the theft is "from the part of a **residence premises** rented to others . . . caused by a tenant." Thus, the first sentence of this entry does not establish an ambiguity; at most, it establishes that the person who entered these notes did not consider part 9.b.(1). The second sentence, like the entries on the prior dates, does not refer to any Policy provision or language; thus, like the prior entries, because it does not suggest meaning to which *language of the Policy* is reasonably susceptible, it does not create an ambiguity.

For the foregoing reasons, based on our independent review of the extrinsic evidence on which Pearson relies on appeal, we conclude that, because this extrinsic evidence does not suggest any ambiguity in the applicable Policy language, the evidence is irrelevant and, therefore, inadmissible as a matter of law for purposes of establishing an ambiguity in the Policy. (*Pacific Gas & Electric, supra,* 69 Cal.2d at pp. 37-40; *George, supra,* 201 Cal.App.4th at p. 1120; *Hervey, supra,* 185 Cal.App.4th at pp. 961-962.)

3. *When Considered Together with Part 9.b.(3)(a) or with the Extrinsic Evidence, Part 9.b.(1) is Not Ambiguous*

Pearson next argues that "the effect of" part 9.b.(3)(a) on part 9.b.(1), along with consideration of certain claim notes, creates an ambiguity. More specifically, Pearson suggests that, by using the word "tenant" in part 9.b.(3)(a) and the phrase "person regularly residing" in part 9.b.(1), the following two interpretations are reasonable:

- part 9.b.(1) applies to *anyone* regularly residing on the "**insured location**," *including* a tenant; yet
- part 9.b.(1) does not apply to *any* tenant, because the exclusion for tenants is specifically addressed at part 9.b.(3)(a).

We reject Pearson's Policy-based argument for the reasons explained at part III.D.1., *ante*. In short, part 9.b.(3)(a) and 9.b.(1) are two exclusions that *both* apply to a loss caused by theft; and one, or the other, or both may apply depending on whether the thief was a tenant (pt. 9.b.(3)(a)), a regular resident (pt. 9.b.(1)), or both. In contract interpretation parlance, Pearson's second suggested interpretation is not reasonable; if the loss caused by theft was committed by a tenant who regularly resides on the "**insured location**," then the Policy excludes the loss under part 9.b.(1).[14]

Pearson further argues that extrinsic evidence supports her position that part 9.b.(1) is ambiguous in light of part 9.b.(3)(a)'s use of the word "tenant." She contends that, based on State Farm's claims notes, "the adjusters gloss[ed] right over [part 9.b.(1)] and mov[ed] straight to [part 9.b.(3)(a)] to determine if that exclusion applied," arguing that "had the adjusters believed that [part 9.b.(1)] applied to tenants, they would have originally used [part 9.b.(1)] to deny coverage, which they did not." We reject outright—i.e., without provisionally receiving the extrinsic evidence (see *Pacific Gas & Electric*, *supra*, 69 Cal.2d at p. 37)—Pearson's argument, because she has not

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14 In such a situation, the Policy would also exclude the loss under part 9.b.(3)(a), but Pearson's argument is only that the Policy is ambiguous because it was unclear whether the *part 9.b.(1)* exclusion would apply.

pointed us to the specific evidence on which she relies regarding State Farm's "adjusters glossing right over" part 9.b.(1). In any event, even if we assume such evidence exists (either in the above-discussed three entries on May 26-29, 2015, or elsewhere), it does not expose an ambiguity *in the language of part 9.b.(1)*; at best, it would disclose the claims handling process in this case, which was not at issue in the cross-motions for summary adjudication and is not at issue on appeal.

4. *The Language in Part 9.b.(1) Is Not Ambiguous*

On two separate bases, Pearson argues that the language in part 9.b.(1) is ambiguous. Before we consider her arguments, we will repeat the relevant language of part 9.b.(1) and of its defined terms.

Part 9.b.(1) provides in relevant part that a loss caused by theft is excluded if it was "committed by . . . any . . . person regularly residing on the **insured location**." The "**insured location**" is defined in relevant part as "the **residence premises**" and "the part of any other premises, other structures and grounds used by you as a residence" and "any premises used by you in connection with the premises included in [either the '**residence premises**' or the part of any other premises, other structures and grounds used by you as a residence]." The "**residence premises**" is defined in relevant part as either "the one, two, three or four-family dwelling, other structures and grounds . . . *where you reside* and which is shown in the **Declarations**" *or* "that part of any other building . . . *where you reside* and which is shown in the **Declarations**." (Italics added.) For purposes of this appeal, the "**residence premises**" is the Alta Vista Property. Thus, the exclusion

contained at part 9.b.(1) applies to any loss caused by theft if the theft is committed by any person regularly residing on the Alta Vista Property.

First, Pearson argues that the clause "where you reside," as used in the definition of "**residence premises**" (and italicized in the immediately preceding paragraph) is ambiguous. According to Pearson, that clause has two potential meanings:

- "Pearson resides on the entire property or at the address of the property because she owns it, regardless of whether portions of the property are rented to others"; and
- "areas in the insured's home where she actually inhabits."

Second, in a similar argument, Pearson contends that the clause " 'regularly residing . . . where you reside' " is ambiguous.[15] (Initial capitalization omitted.) According to Pearson, that clause has two potential meanings:

- "the individual merely needs to be living under the same roof or share the same address as the insured for there to not be coverage"; and
- "the individual needs to be residing in all of the same areas as the insured, and have unfettered access to those areas, to be regularly residing 'where you reside.' "

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[15] Part 9.b.(1) does not contain the clause "regularly residing . . . where you reside," and Pearson does not explain where such language is located. We have assumed that she is relying on the language in part 9.b.(1) that excludes any loss caused by theft "committed by . . . any . . . person *regularly residing* on the **insured location**" (italics added); "**insured location**" includes "the **residence premises**"; and "**residence premises**" means the "dwelling, other structures and grounds[,] or . . . that part of any other building . . . *where you reside* and which is shown in the **Declarations**" (italics added).

With regard to both of Pearson's arguments, under both of Pearson's suggested meanings, the exclusion applies. That is because, *irrespective of* "where [Pearson] resides," that location is "on the **insured location**" for purposes of applying the exclusion contained at part 9.b.(1). The "**insured location**" includes the "**residence premises**." *Regardless* "where [Pearson] resides" it is within the "**residence premises**"; and the "**residence premises**" is "shown on the **Declarations**" to be the Alta Vista Property. Thus, even if the clause "where you reside" may be ambiguous in *some* context given the living arrangement in the present case,[16] because each of the locations under the potential ambiguity is "on the **insured location**," the exclusion at part 9.b.(1) nonetheless applies. (*E.M.M.I., supra,* 32 Cal.4th at p. 470 [potential ambiguity determined "in the context of *this* policy and the circumstances of *this* case"].)

IV. DISPOSITION

The judgment is affirmed. State Farm is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

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16 We express no opinion as to whether Pearson's argument establishes an ambiguity in the clause "where you reside."

IRION, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.